In the District Court of the United States for the Northern District of Oklahoma

CIVIL No. 525

RISS & COMPANY, INC., PLAINTIFF-APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913. The decree, entered on June 23, 1943, dismissed appellant's complaint. An appeal to the Supreme Court was allowed on August 13, 1943, and the United States was served with the appeal papers on August 18, 1943.

Appellant's suit was one to set aside an order of the Interstate Commerce Commission dated April 6, 1940 (22 M. C. C. 541), denying appel-

lant's predecessor a certificate as a common carrier of property by motor vehicle under the "grandfather clause" of Section 206 of Part II of the Interstate Commerce Act (49 U. S. C. 306.[1]) Appellant did not contest the facts, accepting the findings made by the Commission in its report of April 6, 1940.

The only issue raised in appellant's assignment of errors is the question of law whether, upon the facts found by the Interstate Commerce Commission, the District Court was correct in holding, under the authority of *Gregg Cartage & Storage Co.* v. *United States,* 316 U. S. 74, that the interruption of service following the bankruptcy of appellant's predecessor in interest was not an interruption of service "over which the applicant or its predecessor in interest had no control" within the meaning of Section 206 (a) of the Act,[2] and

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[1] Appellant's complaint also sought to set aside the Commission's order of May 2, 1940 (35 M. C. C. 383), disposing of its application under Section 213 of Part II of the Interstate Commerce Act (49 U. S. C. 313) for approval of the purchase of its predecessor's operating rights. Since this order was based on the conclusion reached in the order of April 6, 1940 that appellant's predecessor had no "grandfather" operating rights, because of interruption in service, and thus could transfer nothing to appellant, no additional questions are presented with respect to the order of May 2, 1940.

[2] Section 206 (a) provides (49 U. S. C. 206 (a)):

"Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or

that it was therefore fatal to the existence of "grandfather" rights.

From the Commission's report, it appears that appellant's predecessor in interest, the original "grandfather" applicant, Sooner Distributing Company, Inc., filed a petition on May 12, 1937, with the United States District Court for the Northern District of Oklahoma under Section 77b of the Bankruptcy Act. On the same date, the court approved the petition, and provided that applicant be continued in the possession of its property and continue to operate its business pending a hearing set for June 2, 1937. On June 3, 1937, two trustees were appointed by the court to take possession of the debtor's estate and continue to operate it under the jurisdiction of the court and to submit within 30 days a plan of re-

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within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to

organization. On June 21, 1937, the trustee petitioned the court for an order liquidating the debtor's estate, because the business was being conducted at a loss; there was no chance of raising sufficient working capital; the debtor was bankrupt; and no successful plan of reorganization could be offered. On June 29, 1937, the court adjudged the debtor to be a bankrupt and ordered the discontinuance of the business forthwith. All operations were discontinued on June 29, 1937, and have not since been resumed.

On July 8, 1937, the trustees applied to the referee in bankruptcy for an order to sell certain certificates and permits issued by various State

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the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307 (a) of this chapter and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

authorities "and any other such certificates or permits under control of the bankrupt, if any." At the sale on July 16, 1937, the highest bid received for such rights was $10,000. This bid was conditioned on approval of the transfer by the regulatory bodies having authority in the premises. The bid was rejected by the referee, and further bids were offered in open court, the highest of which was $17,500, offered by appellant. This bid was accepted after the court fully advised all bidders, including appellant, "that said bid was being accepted unconditionally and for cash." Such rights as the bankrupt estate had were conveyed to appellant on July 20, 1937, "without any guarantee, restriction, or reservation as to the validity of the transferability" of such rights. The price paid by appellant has been distributed with other assets to the creditors of the bankrupt.

On September 16, 1937, appellant applied to the Interstate Commerce Commission for approval of the purchase. This application was dismissed by the Commission on May 2, 1940, action thereon having been withheld pending determination of the "grandfather" proceeding by the Commission. On April 6, 1940, the Commission denied the "grandfather" application on the ground that there had been an interruption of service, as in the *Gregg* case, 10 M. C. C. 255, 21 M. C. C. 17.[3]

[3] The Commission's decision in the *Gregg* case was upheld by the District Court and the Supreme Court, 42 F. Supp. 266, 316 U. S. 74.

It is submitted that the decree of the District Court should be affirmed without argument because the appeal therefrom presents no substantial question. The District Court correctly held that the instant case is indistinguishable from *Gregg Cartage & Storage Co.* v. *United States,* 316 U. S. 74, 82–83.[4] Appellant asserts that the facts here are somewhat different from those in the *Gregg* case, and it relies upon *Shawmut Transportation Company, Inc.* v. *United States,* 49 F. Supp. 831 (D. Mass.), which was decided a year after the *Gregg* case. Appellees submit, however, that such differ-

[4] In fact, the case at bar was postponed by stipulation pending decision in the *Gregg* case, which was decided April 13, 1942. The present suit was instituted on February 7, 1941. On or about July 17, 1941, at the suggestion of appellant's counsel, the following stipulation was entered into:

"It is hereby stipulated by and between the parties hereto by their respective counsel, as follows:

"I. A case known as *Gregg Cartage & Storage Company, Hugh W. Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, and Northeastern Transportation Company, Appellants,* vs. *The United States of America and Interstate Commerce Commission, Appellees,* now pending on appeal to the Supreme Court of the United States from the District Court of the United States for the Northern District of Ohio, Eastern Division, the order allowing the appeal in said case having been signed July 14, 1941, involves questions of law similar to those involved in the above entitled case.

"II. The trial of the above entitled case shall be postponed until some date subsequent to the entry of a final judgment by the Supreme Court of the United States in the said case of *Gregg Cartage & Storage Company et al.,* vs. *The United States of America et al.*"

ences as may exist with respect to the facts between the present case and the *Gregg* case are entirely immaterial, and that even if the *Shawmut* case be accepted as authoritative it is not controlling here.

In the *Gregg* case, a carrier was forced into bankruptcy while its "grandfather" application was pending. In large part, its plight was due to the insolvency of an insurance company, necessitating payment of large claims by the carrier, as well as premiums for new insurance. The carrier arranged for a receivership in a court of the State of Ohio, the company's counsel being appointed receiver on October 4, 1937.[5] On the same day, creditors field a petition in the United States District Court, which on October 27, 1937, adjudicated the company a bankrupt, and on October 30, 1937, appointed a receiver. The receiver took over the business on the day of his appointment, but conducted no operations at any time.[6] On December 6, 1937, he sold the bankrupt's rights to a corporate purchaser which applied to the Commission on January 7, 1938, for approval of a transfer.

On these facts, the Supreme Court held that a certificate under the "grandfather clause" had properly been denied, pointing out (316 U. S. 74, 80, 82–83) that:

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[5] The state receiver merely delivered shipments on hand and did not solicit or accept any new business.

[6] The Commission found that no operations had been conducted since October 30, 1937. 10 M. C. C. 255, 260.

The Commission was warranted in holding as a matter of law that the interruption because of bankruptcy was not one over which the applicant had no control within the meaning of the Motor Carrier Act. The complexity of the chain of causation shown in this case makes it an apt illustration of the impracticability of any other rule.

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Furthermore, the interruption of service was the deliberate act of those who for the time being stood in the position of applicant and owned its rights. During the interval between receivership and sale of these rights to Northeastern, we take it that the beneficial interest therein vested in the creditors and the legal title in the receiver or trustee. The federal receiver or trustee could have been authorized to conduct the business of the bankrupt for a limited period, if in the best interests of the estate. Par. 2 of the Act of July 1, 1898, as amended, 11 U. S. C. Par. 11. The creditors and their representatives, however, failed to seek such authority, evidently regarding the rights, which later sold for $850, not worth the expense and risk of continuing business. It is the purchaser Northeastern, organized to acquire the "grandfather" rights, and to an undetermined extent identified with the management of the bankrupt, which, having bought these rights in this state of voluntarily suspended animation, seeks to revive

them. But it cannot say that it takes the rights free of any impairment by the voluntary suspension of operation by the then owner from whom it derives title.

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In its opinion the Commission stated that "it is useless to speculate upon the question whether the 'grandfather' right expired before or after the sale." This we understand to mean that, having determined that the cessation of operations was not a matter over which Gregg "had no control," the Commission was of opinion that by the time of the sale the cessation of operations was of sufficient duration—at least 69 days—to establish that Gregg had not been "in * * * operation since" June 1, 1935, within the meaning of Par. 206 (a). This was a reasonable conclusion, especially since any substantial interruption of one carrier's service tends to result in expansion of other facilities to meet the continuing needs of shippers, and thus to cause overcrowding if the suspended service is resumed.

After the adjudication of bankruptcy in the *Shawmut* case, the RECEIVER continued operations up to the date of the sale, and the purchaser on the day after the sale applied to the Commission for approval. The District Court held that there had been no fatal interruption, since the interruption which occurred was due not to the bankruptcy but to the sale, and since the delay caused by the purchaser's inability to operate lawfully

without approval by the Commission was chargeable to the Commission rather than to the purchaser or its predecessor in interest.

The vital distinction between the instant case and the *Shawmut* case is that appellant's predecessor in interest (the trustees in bankruptcy) stopped operations before the sale. An interval of 21 days elapsed between cessation of operations by the trustees and the sale to appellant on July 30, 1937. In the *Shawmut* case, the receiver continued operations continuously up until the sale. Moreover, appellant did not exhibit the same diligence as the purchaser in the *Shawmut* case in applying to the Commission for approval of the transfer. Appellant did not apply for approval until September 16, 1937, an interruption of service of 79 days' duration. In the *Shawmut* case, the purchaser applied to the Commission for approval of the transfer on the day following the sale. Furthermore, the purchaser thereupon, finding that the transfer could not be approved immediately by the Commission, applied ten days after the sale for temporary operating authority by way of a lease of operating rights, and resumed operations as soon as temporary authority was granted. However, appellant never applied for temporary authority, even after the Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act) was amended on June 29, 1938, to provide for the granting of temporary authority in such contingencies (49 U. S. C. 310a).

The differences between this case and the *Gregg* case are immaterial; obviously, the fact that a receiver was appointed by a state court in the *Gregg* case, whereas here the entire bankruptcy proceeding was in the federal court, is not a circumstance of significance. It is true that the *Gregg* case involved an involuntary bankrupt, whereas appellant's predecessor was a voluntary bankrupt, and, moreover, the trustees here petitioned the court for leave to abandon operations and liquidate the business. But instead of strengthening appellant's position, this difference in facts causes the doctrine of the *Gregg* case to apply *a fortiori*. Furthermore, in the *Gregg* case the bankruptcy of the Gregg Company was largely due to the failure of an insurance company and here appellant's predecessor's bankruptcy was apparently due entirely to its own mismanagement. With respect to this circumstance also, the *Gregg* case would apply *a fortiori*.

The Receiver of the Gregg Company did not conduct operations at all, whereas the trustees for appellant's predecessor did operate for a time, but ceased to do so 21 days before the sale. It seems plain, nevertheless, that after the trustees in bankruptcy abandoned operations, they stood in the same position as the receiver in the *Gregg* case who had never begun to conduct operations. The duration of interruption of the Gregg service was 69 days, while here the corresponding period was

even longer, 79 days.[7] In this respect, this case is again stronger than the *Gress* case. Furthermore, as appears from the above-quoted language of the opinion in the *Gregg* case, the Commission's administrative determination with respect to the question whether the cessation of operations was of sufficient duration to extinguish "grandfather" rights will be sustained if the Commission reaches a "reasonable conclusion" (317 U. S. 74, 83).[8] No

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[7] The period of 69 days mentioned in the Court's opinion in the *Gregg* case evidently extended from the date of the receiver's appointment (October 30, 1937) to the date of application by the purchaser to the Commission for approval of the transfer (January 7, 1938), though the Court speaks as if "by the time of the sale" a sufficient period of time had elapsed to cause "grandfather" rights to be extinguished (316 U. S. at 83, quoted above). From the appointment of the receiver to the date of the sale (December 6, 1937) in the *Gregg* case would be 37 days, as compared with 21 days' interruption prior to the sale here. In the *Shawmut* case, the sale and application to the Commission for approval were practically simultaneous, and the receiver had continued operations up to that time.

It is submitted that the entire period until application is made to the Commission may properly be included in computing the duration of the interruption of service. Delay in authorizing a purchaser to operate is surely not chargeable to the Commission until after application has been made to it for such authority, and the date of making such application is plainly a matter within the purchaser's control. Whether the date of the sale or the date of the application is controlling under the *Gregg* doctrine, that case is in either event fatal to appellant's contentions.

[8] The test of reasonableness is a familiar standard in judicial review of Commission decisions. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S.

particular period of time is prescribed by statute as necessary in order to constitute a fatal interruption of service,[9] and the conclusion in the present case is clearly reasonable.

Consequently, the above-quoted views of the Supreme Court in the *Gregg* case are fully applicable to appellant. The trustees could have continued to conduct the business of the bankrupt if in the best interests of the estate. However, they evidently regarded the "grandfather" rights, which they later sold en bloc, with a number of state permits and certificates, as not worth the expense and risk of continuing business. Appellant, having bought these rights "in this state of voluntarily suspended animation," cannot say that it takes them "free of any impairment by the voluntary suspension of operation by the then owner from whom it derives title" (316 U. S. at 82–83). Thus, the cessation of operations was not a matter over which appellant and its predecessors had no control; and by the time of the sale (or the time of making application to the

282, 286–7. As stated in *United States* v. *Maher*, 307 U. S. 148, 154, the determination of controverted issues with respect to whether a particular application meets the requirements of the "grandfather clause" is a task which "Congress entrusted to the Commission".

[9] Emphasizing that no particular period of time was requisite, a three-judge court for the District of Delaware in *Transamerican Freight Lines* v. *United States* (Civil No. 274, decided August 10, 1943), upheld the Commission in denying a "grandfather" application because of an interruption of 28 days until the date of the sale.

Commission for approval of the transfer), the cessation of operations was of sufficient duration to establish that plaintiff and its predecessors in interest had not been in *bona fide* operation on and since June 1, 1935, to the date of the Commission's decision,[10] within the meaning of Section 206 (a) of Part II of the Interstate Commerce Act (49 U. S. C. 306 (a)). Accordingly, the Commission and the District Court properly followed the *Gregg* case in holding that appellant's predecessor was not entitled to "grandfather" rights.

For the foregoing reasons, it is evident that the errors assigned by appellant are without substance. It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

CHARLES FAHY,
Charles Fahy,
Solicitor General,
DANIEL W. KNOWLTON,
Daniel W. Knowlton,
General Counsel,
Interstate Commerce Commission.

AUG. 31, 1943.

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[10] The "grandfather" clause requires continuous operation from June 1, 1935, until the hearing by the Commission on the application. *United States* v. *Maher*, 307 U. S. 148, 155; *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74, 78.

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